No. 92-1748

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

ESTATE OF JOHN L. BOHN, et al.,

Petitioners,

v.

PAUL WADDELL, et al.,

Respondents.

ARTHUR J. ABBOTT, et al.,

Petitioners,

v.

PAUL WADDELL, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Arizona Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does it violate Due Process to require a taxpayer to exhaust the administrative remedies mandated by state law before challenging a state tax statute in state court?

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ADDITIONAL STATUTES INVOLVED

Section 42-124, Arizona Revised Statutes, provides in relevant part as follows:

> Appeals to state board and to court
>
> A. A person aggrieved by a final decision or order of the department under this article may appeal to the state board by filing a notice of appeal in writing within thirty days after the receipt of the decision or order from which the appeal is taken. The board shall take testimony and examine documentary evidence as necessary to determine the appeal, all pursuant to administrative rules to govern such appeals. On determinining the appeal the board shall issue a decision consistent with its determination. The board's decision is final on the expiration of thirty days from the date when notice of its action is received by the taxpayer, unless either the department or the taxpayer brings an action in superior court as provided in subsection B.
>
> B. The department or a taxpayer aggrieved by a decision of the board may bring an action in superior court subject to the following provisions:
>
> . . .
>
> 2. . . . In the case of income tax the taxpayer may bring an action against the department in superior court without paying the tax, penalty or interest under protest. . . .

SUPPLEMENTAL STATEMENT OF THE CASE

On March 28, 1989, this Court invalidated a Michigan income tax scheme on the ground that it violated intergovernmental tax immunity. *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989). Like 22 other states, Arizona had a similar tax scheme. Arizona's statute was in place and unchallenged for over 35 years before *Davis*. Arizona Revised Statutes (A.R.S.) § 43-1022 exempted from state taxation all state and local government retiree benefits, but only $2,500 of federal civil service retiree benefits.

This action was commenced on May 1, 1989, a little over a month after *Davis* was issued. Unlike *Davis*, this case was not originally brought as a claim for refund. The sole cause of action in the Complaint and First Amended Complaint was a civil rights claim for damages and equitable relief against various state tax officials and their spouses under 42 U.S.C. § 1983. Damages were to be measured by the amount of income tax paid on retirement benefits. (Appendix to Petition (App. to Pet.) at 4a.) It was not until July 12, 1989, after Petitioners' Motion Challenging the Jurisdiction and Creation of the Tax Court had been denied (M.E. 8, 8a), that the Second Amended Complaint containing a claim for income tax refund was deemed filed. (App. to Pet. at 5a.)[1]

Within twenty days of serving the initial complaint in this matter, Petitioners were made fully aware of the

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[1] The Tax Court held the individual defendants to have qualified immunity from § 1983 damage claims. *Bohn v. Waddell*, 164 Ariz. 74, 83-87, 790 P.2d 772, 779-785 (Tax 1990). Petitioners did not appeal this ruling.

statutory requirement to exhaust administrative remedies to obtain a tax refund. Indeed, Respondents ("Department") immediately filed a motion to dismiss the complaint (Index of Record (I.R.) 17) asserting that the Petitioners had failed to exhaust the required administrative remedies necessary to obtain a tax refund. (App. to Pet. at 4a, *see* A.R.S. §§ 42-115, 122, 124, 129 and 130, cited in App. to Pet. at 14a-16a.) The Department continued to raise the issue of lack of subject matter jurisdiction at several critical points in the Tax Court litigation. (App. to Pet. at 5a.).

Petitioners chose not to exhaust statutory administrative remedies, but they did file protective claims for refund with the Department. (I.R. 230, p. 2, ¶ 4.) For those who filed amended returns or Notices of Claims, including Petitioners, the administrative process remains open.[2]

It is important to clarify what the Arizona Court of Appeals held in its decision. Applying well-established Arizona law the court held as follows:

1. A taxpayer may present a constitutional challenge in the administrative proceeding to reduce or correct an assessment. (App. to

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[2] Petitioners characterize the Notice to Federal Retirees sent to taxpayers as a representation by the State that the lawsuit would resolve the case. Petition, pp. 5 and 11, App. to Pet. at 166a. This ignores the early and persistent raising of the exhaustion defense by the Department of Revenue. In reality, the Notice served to put taxpayers on notice that they needed to act to preserve their rights to pursue administrative remedies. Approximately 40,000 taxpayers did so, and the Department will treat those who timely filed the Notice of Claim as having filed timely claims for refunds.

Pet. at 11a.) The Arizona Department of Revenue and the State Board of Tax Appeals (BOTA) can consider constitutional issues when they perform their quasi-judicial function. (App. to Pet. at 18a.)[3]

2. The Arizona tax refund statute does not limit the grounds that the taxpayers may raise in the refund process. *See* A.R.S. §§ 42-124 and 42-130. (App. to Pet. at 19a.)

3. BOTA has applied constitutional doctrines and federal law when resolving claims and has the authority to apply constitutional doctrines to refund claims. (App. to Pet. at 20a.)

4. The application of the constitutional doctrines and federal law in the *Davis* holding to each taxpayer's right to a refund is a proper subject for the administrative process. (App. to Pet. at 20a.)

The Court of Appeals took great pains to make clear that the Board may apply and has applied constitutional doctrines and federal law when resolving claims. (App. to Pet. at 20a.) In addition, the court concluded that exhaustion of remedies would be appropriate in the tax context even were the Department and Board unable to address constitutional issues. (App. to Pet. at 21a.) Finally, the decision was based, in part, on the fact that the administrative agency may decide the case on non-constitutional

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[3] The Appendix to the Petition misprints a section heading of the Court of Appeals' opinion. App. to Pet. at 179. The heading should read: "1. Mandatory Administrative Remedy Could Determine Refund Issue."

grounds, and the agency will develop the record. App. to Pet. at 21a.[4]

ARGUMENT

I. ARIZONA LAW HAS CONSISTENTLY HELD THAT THOSE SEEKING TAX REFUNDS MUST EXHAUST ADMINISTRATIVE REMEDIES; THIS LONG-STANDING REQUIREMENT DOES NOT VIOLATE DUE PROCESS.

Due Process is not violated because administrative remedies must be exhausted. This Court has repeatedly upheld exhaustion requirements in the federal and state courts. *Eg., California v. Grace Brethren Church*, 457 U.S. 393 (1982); *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981); *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981); *First National Bank v. Board of Commissioners*, 264 U.S. 450 (1924). Petitioners attempt to create a constitutional violation by arguing that the state has created a

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[4] Petitioners' concession that this case is "analytically different" from *Harper v. Virginia*, No. 91-794, *cert. granted*, 112 S.Ct. 1934 (1992), is an understatement. *Harper* and related cases deal with substantive issues of law concerning refund rights. This case concerns questions of the proper procedure which must be followed, as a matter of state law, in seeking those refunds. The argument that administrative remedies must be exhausted is not raised only as a defense against the intergovernmental tax immunity doctrine. Respondents raise it anytime a taxpayer seeks to circumvent the administrative process. *Cf. Estate of Ladewig v. State*, Arizona Tax Court No. TX91-00125 (commerce clause and equal protection claims); *Hamilton v. State*, Arizona Tax Court No. TX90-00289 (claim based on interpretation of state tax statute).

"new remedial scheme" which will prevent them from obtaining relief.[5] Petitioners cite as authority this Court's ruling that a state may not change the rules concerning exhaustion so as to deprive a taxpayer of all existing remedies. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930).

The analogy to *Brinkerhoff*, however, is not well-taken. The Supreme Court of Missouri had earlier held that the state tax commission had no authority to grant relief to a taxpayer claiming tax discrimination. *Laclede Land & Improvement Co. v. State Tax Commission*, 295 Mo. 298, 243 S.W. 887 (1922). As a result, the taxpayer did not seek relief from the commission. The Missouri Supreme Court overruled itself in its *Brinkerhoff* decision to hold that relief should have been sought from the tax commission and that the taxpayer's failure to do so constituted laches justifying dismissal of the claim. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 323 Mo. 180, 19 S.W.2d 746 (1929). This Court noted in its opinion that the "possibility of relief before the tax commission was not suggested by any one in the entire litigation until the [Missouri] Supreme Court filed its opinion on June 29, 1929." 281 U.S. at 677.

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[5] Petitioners cite several cases, but few involve due process questions. Most involve questions of whether exhaustion is required as a matter of federal statutory law. These cases are not particularly helpful in defining the due process requirements associated with tax refund actions. Petitioners have not questioned that, in Arizona, taxpayers are provided a full hearing and are entitled to subsequent judicial review. *Cf. California v. Grace Brethren Church*, 457 U.S. 393 (1982).

This Court reversed the Missouri court, finding a violation of due process. It noted that the "state court refused to hear plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact was never available and which is not now open to it." *Id.* at 679. These circumstances are not present in this case.

The remedial scheme in Arizona that Petitioners label the "new remedial scheme" is sixty years old. Since 1933, Arizona has had statutory administrative requirements that must be met to obtain an income tax refund. Ariz. Sess. Laws 1933, (1st S.S.), Ch. 8, § 44, § 39 and § 40. The Court of Appeals cited well-established Arizona Supreme Court policies requiring exhaustion of administrative remedies in tax cases. (App. to Pet. at 11a-24a.) The court correctly relied on the Arizona Supreme Court decision *Southern Pac. Co. v. Cochise County*, 92 Ariz. 395, 406, 377 P.2d 770, 778 (1963), for the fundamental approach to an Arizona refund tax case. (App. to Pet. at 11a-13a.) The court noted that the procedures for a tax refund in Arizona are statutory and must be scrupulously followed. *Southern Pac. Co., supra*, 92 Ariz. at 406. Jurisdiction to consider a tax refund claim is conferred on the superior court by an appeal of a valid BOTA (successor to the Arizona Tax Commission) order. *State v. Airesearch Manufacturing Co.*, 68 Ariz. 343, 351, 206 P.2d 562 (1949).

The decision of the Arizona Court of Appeals is not a "new" remedy such as existed in *Brinkerhoff*. The administrative process that Petitioners failed to exhaust is not new at all. It reflects a long-standing, clearly established

requirement of Arizona law. Respondents informed Petitioners of Arizona's statutory tax refund procedure immediately upon commencement of this action in Tax Court, and have consistently asserted that Petitioners must first exhaust this administrative remedy.[6]

Petitioners seem to argue that they had to go to court because the Board of Tax Appeals had no jurisdiction to hear their case. Petition, p.11, n.15. This is incorrect. The Court of Appeals correctly noted that the Department and BOTA did have jurisdiction to hear the case. The court relied upon a critical distinction that Petitioners ignored:

> *A fundamental distinction must be recognized between constitutional applicability of legislation to particular facts and constitutionality of the legislation*. When a tribunal passes upon constitutional applicability, it is carrying out the legislative intent, either express or implied or presumed. When a tribunal passes upon constitutionality of the legislation, the question is whether it shall take action which runs counter to the legislative intent. We commit to administrative agencies

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[6] Petitioners' counsel were also involved in *Davis* actions in two other states where exhaustion of administrative remedies was a central issue. *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 112 S.Ct. 867 (1992); *Hogan v. Musolf*, 163 Wis. 2d 1, 471 N.W.2d 216, 224 (1991), *cert. denied*, 112 S.Ct. 867 (1992). The involvement of Petitioners' counsel in these cases, as well as the instant action, provided them with early notice that state courts required exhaustion of administrative remedies, even when a claim is based on federal rights. At the beginning of *Nutbrown*, the Oregon Tax Court dismissed the claim on the ground that the taxpayers failed to exhaust their administrative remedies. *Nutbrown*, 811 P.2d at 133.

> the power to determine constitutional applicability, but we do not commit to administrative agencies the power to determine constitutionality of legislation. Only the courts have authority to take action which runs counter to the expressed will of the legislative body.

Bohn v. Waddell, App. to Pet. at 20a, quoting K. Davis, *Administrative Law Treatise*, § 20.04, p.74 (1958) (footnote omitted) (emphasis supplied by Court of Appeals). The court noted that the Board had properly applied this distinction, and had regularly applied constitutional doctrines and federal law when resolving claims. *See* BOTA (Board of Tax Appeals) cases cited in the Court of Appeals' opinion, App. to Pet. at 20a. The court also noted that it had previously rejected the argument that administrative agencies cannot consider constitutional questions when performing quasi-judicial functions. *Valley Vendors Corp. v. City of Phoenix*, 126 Ariz. 491, 616 P.2d 951 (App. 1980). Petitioners, therefore, were on notice that the agency had the power to consider their claims. They should have exhausted administrative remedies before filing in superior court.

Petitioners claim that *State v. Osborne*, 14 Ariz. 185, 188, 125 P. 884, 887 (1912) and *Batty v. Arizona State Dental Bd.*, 57 Ariz. 239, 112 P.2d 870 (1941) demonstrate that they did not need to exhaust their statutory remedies before filing suit. They are not correct. *Osborne* and *Batty* are not tax cases, and, therefore, are not on point. *Osborne* does not discuss the power of an administrative tax tribunal, but considers whether a question is judicial or political and, therefore, non-justiciable. *Batty* held that a court can use a writ of *certiorari* to review a quasi-judicial

decision. Neither of these cases obviates the *Valley Vendors* tax decision.

Requiring litigants to exhaust statutorily mandated administrative procedures does not violate the due process rights of those who knew of the procedures and elected to ignore them. Petitioners' claim that due process is violated because the appeals process does not set mandatory time limits on when a Department or Board hearing is held or a decision is issued is incorrect. Petitioners' authority for this position is *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 586 (1989), a non-tax case involving the non-statutory procedures of a federal agency. Most importantly, *Coit* is not a due process case, and does not in any way consider the scope of the Due Process Clause.[7] The case involved a question of statutory interpretation, and whether, under those statutes, exhaustion was required. The creditors in *Coit* brought suit in federal court after waiting for 13 months for an *initial* determination because no time limit was established for allowing or disallowing a claim retained for further review. However, under A.R.S. § 42-130(B), part of the statutory process at issue in this case, an initial determination is made by operation of law – if the agency does not deny a claim, it is deemed denied six months after the claim is filed and the taxpayer may request a hearing. Failure to include strict time limits within the statute does not make the statute unconstitutional.

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[7] Petitioners' citation of *Coit* on page 16 of their Petition as a due process case is misleading.

Even more importantly, petitioners show no unfairness in requiring them to pursue administrative remedies. While they speculate about the horrors of delay, bias and futility, there is no actual controversy about any of these possibilities since petitioners never asked the Department of Revenue or Board of Tax Appeals for a hearing. Delays which *might* occur are not ripe for review as due process violations. *Coit Independence Joint Venture v. Firstsouth, F.A.*, 829 F.2d 563 (5th Cir. 1987), *rev. on other grounds*, 489 U.S. 561 (1989). As the lower court in *Coit* held, due process claims about what might happen are not ripe because "a party seeking to overturn legislation as unconstitutional must be 'immediately harmed, or immediately threatened with harm' by the application of the statute." *Id.* at 565 (quoting *Poe v. Ullman*, 367 U.S. 497, 505 (1961)).

The argument that the requirement to exhaust places petitioners before a biased Department in violation of the due process clause is unfounded. Petitioners have sued the Director and Assistant Director and several former Directors and their spouses as individuals under 42 U.S.C. § 1983, claiming damages measured by a tax refund of all tax paid on federal benefits. This claim was denied on the grounds that these officials have qualified immunity from suit; a ruling which was not appealed by Petitioners. Since the Department officials are immune from suit, there is no reason for bias. Taxpayers cannot circumvent the administrative tax refund process by suing Department officials individually under § 1983 for

damages rather than filing in the proper forum for a refund.[8]

Furthermore, due process is not violated merely because of the possibility of bias. The case cited by Petitioners as authority came to a very different conclusion, holding that due process is not violated merely because of the "combination of investigative and adjudicative functions" in one agency. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). To successfully argue bias as a basis for skipping mandated procedures, a claimant "must overcome a presumption of honesty and integrity in those serving as adjudicators." *Id.* Petitioners fail to overcome that presumption.[9]

Petitioners also ignore the prepayment remedy under Arizona law by which a taxpayer need not pay an income tax assessment before seeking administrative and judicial review. A.R.S. §§ 42-122 and 42-124. Any action of the Department or the Board may be appealed to court before it becomes final and before any assessment becomes collectible. A.R.S. § 42-124. Petitioners, in fact, paid the tax and now seek refunds. They chose to forego the predeprivation remedy provided by Arizona law. They should not now complain that the law requires that before they seek judicial relief they first ask for the money back from the agency to which they paid it.

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[8] In any event, individual officers will be indemnified by the state for any damages.

[9] Furthermore, the Court of Appeals correctly noted that the "Taxpayers did not raise any issue of bias on the part of the Board of Tax Appeals." App. to Pet. at 22a.

Petitioners cite A.R.S. § 35-196.03 in an attempt to show that the Board cannot rule for a taxpayer in a constitutional case. Petition, p.18. The statute, however, imposes no such restriction; indeed it does not even apply to the Board. The statute concerns the payment of refunds collected under a law declared invalid by a court. The Board decides tax controversies, it does not pay out money. Petitioners' argument would be valid only if (a) the Board rules for a taxpayer, (b) the Department does not appeal to court, and (c) no refund is paid. Such a scenario is speculative; the possibility of it occurring is remote and unsupported by the record. The Department makes refunds if it chooses not to appeal the Board decisions. A.R.S. § 42-129(A).

Petitioners make the speculative argument that the Department cannot make a refund mandated by an unappealed Board decision. No law or policy prohibits such a payment. Common sense may demand it. The argument is meritless.

Petitioners' concern about whether a prevailing party can appeal to court from a Board decision is similarly strained. Nothing in the record demonstrates that the Department would receive an adverse Board decision, not appeal the decision, and then ignore it. The Department routinely follows Board decisions. If the Department does not agree with a Board decision, it may appeal. A.R.S. § 42-124.[10] If no appeal were filed, the decision would be

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[10] Examples of appeals by the Department from adverse Board decisions are *State v. Dillon*, 170 Ariz. 560, 826 P.2d 1186 (App. 1991) (Board rules tax preempted by federal law); *Department of Revenue v. Moki Mac River Expeditions*, 160 Ariz. 369, 773

final as to the controversy, and have *res judicata* effect. *Yavapai County v. Wilkinson*, 111 Ariz. 530, 532, 534 P.2d 735 (1975). There would be no need for a new adjudication.

II. THERE IS NO CONFLICT AMONG THE STATES.

The Arizona Court of Appeals held that the Arizona courts have jurisdiction to consider tax refund claims only if the taxpayer first exhausts administrative remedies, as required by Arizona law. (App. to Pet. at 12a-13a.) Petitioners claim however, that there is a conflict among the state courts on the due process issue presented. Petition, p.20. None of the cases upon which petitioners rely disagrees with this holding.

Although the Colorado Supreme Court did hold that administrative remedies need not be exhausted in its *Davis* case, it rested its decision on state law grounds, not

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P.2d 474 (App.), *cert. denied*, 110 S.Ct. 405 (1989) (Board held tax violated Commerce Clause); *Arizona Department of Revenue v. Robinson's Hardware*, 149 Ariz. 589, 721 P.2d 137 (App. 1986) (Board holds tax violates Import-Export Clause of U.S. Constitution); *Arizona Department of Revenue v. Control Data Corporation*, 131 Ariz. 452, 641 P.2d 1296 (App. 1981) (Board held rental receipts from equipment leases to United States Army were exempt from taxation); *State v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596 (App. 1980) (Board ruled federal law preempted the privilege tax on interstate air transportation of passengers.) *Control Data* involved a question of state statutory interpretation. Each of the other cases involved federal law or constitutional claims, showing once again that there is nothing "new" about the Board hearing such issues and ruling that state-imposed taxes sometimes run afoul of the federal constitution.

on the due process clause as petitioners suggest. *See Kuhn v. State, Dep't. of Revenue*, 817 P.2d 101 (Colo. 1991), *cert. dismissed*, 112 S.Ct. 1925 (1992). The court stated that a party challenging the constitutionality of a statute need not first exhaust the administrative remedies provided in the statute. *Kuhn*, 817 P.2d at 104. For this proposition, the court cited *Fred Schmid Appliance & Television Co. v. City & County of Denver*, 811 P.2d 31 (Colo. 1991). In *Fred Schmid*, 811 P.2d at 33, the court held that a Colorado administrative agency lacked authority to pass on the constitutionality of a statute. Thus, *Kuhn* is a state law case, ruling on the power of Colorado administrative agencies, and does not support petitioners' claim of a conflict among the states on the due process issue they seek to present to this Court.

Several state courts have held exhaustion of administrative remedies is required even if the claim is based on a violation of federal rights. *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 112 S.Ct. 867 (1992); *Hogan v. Musolf*, 163 Wis. 2d 1, 471 N.W.2d 216, 224 (1991), *cert. denied*, 112 S.Ct. 867 (1992)[11]; *Raschke v.*

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[11] Significantly, Petitioners do not include *Nutbrown* and *Hogan* in their list of *Davis* related petitions filed during the past two terms. Petition, p.7. These petitions, which were both denied, involved requirements that a taxpayer must first exhaust administrative remedies before challenging a tax statute in court. In both cases, the taxpayers argued that the administrative process was inadequate, biased, and futile, and that the exhaustion requirement violated the Due Process Clause of the Fourteenth Amendment. The requirement that claimants exhaust administrative remedies has not prevented federal retirees from pursuing a remedy in Oregon and Washington. *Ragsdale v. Department of Revenue*, 823 P.2d 971 (Ore. 1992);

Blancher, 141 Ill.App.3d 81, 491 N.E.2d 1171 (1986); *Zizka v. Water Pollution Control Authority*, 195 Conn. 682, 490 A.2d 509 (1985); *Stufflebaum v. Panthiere*, 691 S.W.2d 271 (Mo. 1985); *Johnston v. Gaston County*, 71 N.C.App. 707, 323 S.E.2d 381 (1884), *rev. denied* 329 S.E.2d 392 (1985).

III. ALL TAX REFUND CLAIMS MUST GO THROUGH THE ADMINISTRATIVE PROCESS; THERE IS NO DISCRIMINATION BASED ON STATE AND FEDERAL LAW ORIGIN OF CLAIMS.

Petitioners argue for the first time before this Court that the requirement that administrative remedies be exhausted discriminates against federal constitutional claims. Petition, p. 21. This claim is not supported by the record and Petitioners offer no support for it in their Petition. Because it is newly raised, this Court should not consider it.

Respondents do not dispute the fact that state courts may not discriminate against federal rights, as this Court held in *McKnett v. St. Louis & S.F.R. Co.*, 292 U.S. 230 (1934). *McKnett* is not applicable here, however, because it involved a question of whether a state court had any jurisdiction to hear a claim. The Arizona Court of Appeals did not hold that Petitioners' claims were outside the courts' jurisdiction, but only that exhaustion of administrative remedies was a prerequisite to the exercise of that jurisdiction. App. to Pet. at 11a. Arizona law sets

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Hogan v. Wisconsin Department of Revenue, Wisconsin State Tax Reporter (CCH), ¶¶ 203-336, 203-377 and 203-397.

up a statutory procedure which must be followed to claim a refund of income taxes. A.R.S. §§ 42-122 and 42-124. The dismissal of Petitioners' claim was because they failed to follow this procedure, not because they asserted a federal law claim.[12]

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[12] *State Compensation Fund v. Symington*, 133 Ariz. Adv. Rep. 29, 848 P.2d 273 (Ariz. 1993), does not show, as Petitioners claim at page 21 of their Petition, that state law refund claims do not have to exhaust administrative remedies. The tax at issue was imposed on only one taxpayer, a state agency, and the relief sought was an injunction preventing the collection of the tax, not a refund. There were no statutory administrative procedures to exhaust with regard to the special alternative minimum tax imposed on the Fund. *Fund*, 133 Ariz. Adv. Rep. at 31. The issue of jurisdiction raised in the case was not whether administrative exhaustion was required, but whether the Arizona Supreme Court should exercise its special action discretion to hear the matter or dismiss it for filing in the lower courts. In Arizona, relief previously obtained by writs of certiorari, mandamus, or prohibition are now obtained through a procedure known as a "special action." Arizona Rules of Procedure for Special Actions, Rule 1. Petitioners' citation of this exercise of discretion by the Arizona court as evidence of discrimination is incorrect and misleading.

CONCLUSION

Due process is not violated because taxpayers seeking income tax refunds must first exhaust administrative remedies. The petition for writ of certiorari should be denied.

Respectfully submitted,

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